



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 7, 1998

Ms. Nanette G. Williams
Assistant City Attorney
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR98-0068

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112022.

The City of El Paso (the "city") received requests for four categories of documents, including an audit report concerning Southern Union Gas. You claim that the drafts of the audit report are excepted from disclosure under section 552.106 of the Government Code. As you do not object to the release of the other three categories of documents, we assume that you have or will make these documents available to the requestor. We have considered the exception you claim and reviewed the submitted information.

Initially, you assert that two of the drafts, submitted as Exhibits E and F, are outside the scope of the requests because the city did not receive them at the time of the requests. The Open Records Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983). As the city did not have Exhibits E and F at the time of the requests, it need not comply with the requests as to these draft reports. Thus, we will limit this ruling to Exhibits C and D.

Next, the city claims that the draft reports, submitted as Exhibits C and D, are excepted from disclosure under section 552.106 of the Government Code. Section 552.106 protects drafts and working papers involved in the preparation of proposed legislation. The purpose of the exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body and to thereby protect the internal "deliberative" or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). Section 552.106 does not except purely factual material; rather, it excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. Section 552.106 applies only to drafts and working papers prepared by persons with some official responsibility to prepare them for the legislative body. *Id.*

Section 103.001 of the Utilities Code grants the governing body of a municipality exclusive original jurisdiction over the rates, operations, and services of a gas utility within the municipality in order to provide fair, just, and reasonable rates and adequate and efficient services. The setting of utility rates is a legislative function, even if carried out by an administrative agency. *Public Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 406 (Tex. 1995) (citing *Texas Ass'n of Long Distance Tel. Co. v. Public Util. Comm'n*, 798 S.W.2d 875, 882 (Tex. App.--Austin 1990, writ denied)) (ratemaking, like any other legislation, generally can have only prospective application). You state that the "reports are intended to assist the City in making a determination whether the rates charged by Southern Union Gas Co. are just and reasonable." We have reviewed the information in Exhibits C and D and conclude that the city may withhold most of the information under section 552.106 of the Government Code. We have marked the factual information that must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

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Ref.: ID# 112022

Enclosures: Marked documents

cc: Mr. Patrick McDonnell
El Paso Times Reporter
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(w/o enclosures)